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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 JOHN MARK FENTON,

Case No. 3:16-cv-00749-MMD-CLB

7 Petitioner,

ORDER

8 v.

9 ISIDRO BACA, *et al.*,

10 Respondents.

11
12 Petitioner John Mark Fenton filed a counseled second amended petition for a writ
13 of habeas corpus under 28 U.S.C. § 2254. (ECF No. 39 (“Second Amended Petition”).)
14 Currently before the Court is Respondents’ motion to dismiss the Second Amended
15 Petition. (ECF No. 55 (“Motion”).)¹ For the reasons discussed below, the Court denies
16 the Motion.

17 **I. BACKGROUND**

18 According to the Nevada Supreme Court, “police arrested . . . Fenton for driving
19 under the influence,” and, after “[f]urther investigat[ing],” police found “that Fenton was
20 driving the vehicle of a 71-year-old man found bleeding and injured at a nearby car wash.”
21 (ECF No. 29-8 at 2.) A jury found Fenton guilty of battery resulting in substantial bodily
22 harm upon a person 60 years of age or older, burglary, robbery of a person 60 years of
23 age or older, and grand larceny of a motor vehicle. (ECF No. 29-1.) Fenton was sentenced
24 to an aggregate term of 6 to 22 years in prison. (*Id.*) Fenton appealed, and the Nevada
25 Supreme Court affirmed on January 16, 2013. (ECF No. 29-4.) Following unsuccessful
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28 ¹Fenton opposed the Motion (ECF No. 60), and Respondents replied (ECF No. 63).

1 petitions for rehearing and en banc reconsideration, remittitur issued on June 18, 2013.
2 (ECF No. 29-5.)

3 Fenton filed a state habeas petition on May 29, 2014. (ECF No. 50-1.) The state
4 court granted the petition, vacated Fenton's convictions, and ordered that the case be set
5 for retrial. (ECF No. 29-6.) The State appealed, and the Nevada Supreme Court reversed
6 and remanded. (ECF No. 29-8.) Following the remand, the state court denied the petition.
7 (ECF No. 29-9.) Remittitur issued on July 7, 2023. (ECF No. 29-10.)

8 **II. DISCUSSION**

9 In his Second Amended Petition, Fenton raises the following grounds for relief:
10 (1a) his trial counsel had a conflict of interest warranting relief under *Cuyler v. Sullivan*;
11 (1b) his trial counsel had a conflict of interest warranting relief under *Strickland v.*
12 *Washington*; (2) his trial counsel failed to present a mental health defense; and (3) he
13 was denied his right to confrontation when the trial court allowed a law enforcement officer
14 to testify about the victim's statements. (ECF No. 39.) Respondents argue that grounds
15 1b and ground 2 are unexhausted and/or procedurally barred and Fenton failed to
16 develop the factual basis for ground 3. (ECF No. 55.) This Court will address these
17 arguments in turn.

18 **A. Exhaustion and Procedural Default**

19 In ground 1b, Fenton alleges that his trial counsel had a conflict of interest
20 warranting relief under *Strickland v. Washington*. (ECF No. 39 at 10.) And in ground 2,
21 Fenton alleges that his trial counsel failed to present a mental health defense. (*Id.* at 12.)
22 Respondents argue that grounds 1b and 2 are unexhausted and/or procedurally barred.
23 (ECF No. 55 at 8.) Fenton acknowledges that these grounds are unexhausted. (ECF No.
24 60 at 2.) However, Fenton asserts that these grounds are technically exhausted and
25 procedurally defaulted and that he can overcome the procedural defaults under
26 *Martinez v. Ryan*. (*Id.*)

27 A claim may be considered procedurally defaulted if "it is clear that the state court
28 would hold the claim procedurally barred." *Sandgate v. Maass*, 314 F.3d 371, 376 (9th

1 Cir. 2002). Fenton would face several procedural bars if he were to return to state court.
2 See, e.g., NRS §§ 34.726, 34.810. Nevada has cause and prejudice and fundamental
3 miscarriage of justice exceptions to its procedural bars, which are substantially the same
4 as the federal standards. If a petitioner has a potentially viable cause-and-prejudice or
5 actual-innocence argument under the substantially similar federal and state standards,
6 then that petitioner cannot establish that “it is clear that the state court would hold the
7 claim procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, the courts in
8 this district have generally declined to find a claim subject to anticipatory procedural
9 default unless the petitioner represents that he would be unable to establish cause and
10 prejudice in a return to state court. In such a case, the claim would generally be subject
11 to immediate dismissal as procedurally defaulted, as the petitioner would have conceded
12 that he has no grounds for exception to the procedural default in federal court.

13 However, a different situation is presented where the Nevada state courts do not
14 recognize a potential basis to overcome the procedural default arising from the violation
15 of a state procedural rule that is recognized under federal law. In *Martinez v. Ryan*, the
16 Supreme Court held that the absence or inadequate assistance of counsel in an initial-
17 review collateral proceeding may be relied upon to establish cause excusing the
18 procedural default of a claim of ineffective assistance of trial counsel. See 566 U.S. 1, 9
19 (2012). The Nevada Supreme Court does not recognize *Martinez* as cause to overcome
20 a state procedural bar under Nevada state law. See *Brown v. McDaniel*, 331 P.3d 867,
21 875 (Nev. 2014). Thus, a Nevada habeas petitioner who relies upon *Martinez*—and only
22 *Martinez*—as a basis for overcoming a state procedural bar on an unexhausted claim can
23 successfully argue that the state courts would hold the claim procedurally barred but that
24 he nonetheless has a potentially viable cause-and-prejudice argument under federal law
25 that would not be recognized by the state courts when applying the state procedural bars.

26 Here, Fenton advances only *Martinez* as a basis for excusing the anticipatory
27 default of grounds 1b and 2. Accordingly, the Court considers grounds 1b and 2 to be
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1 technically exhausted and procedurally defaulted. Because the analysis of cause² and
2 prejudice to overcome the procedural defaults of grounds 1b and 2 are necessarily
3 intertwined with the merits of grounds 1b and 2, the Court defers a determination of
4 whether Fenton can overcome the procedural defaults of grounds 1b and 2 until the time
5 of merits determination.

6 **B. Development of Factual Basis of Ground 3**

7 In ground 3, Fenton argues that he was denied his right to confrontation when the
8 trial court allowed a law enforcement officer to testify about the victim's statements. (ECF
9 No. 39 at 14.) Within ground 3, Fenton discusses law enforcement's failure to investigate
10 Randy Whitewater as a suspect. (*Id.*) Respondents argue that Fenton failed to develop
11 the factual basis of his allegations regarding the police investigation of Whitewater,
12 warranting the dismissal of ground 3 or the striking of the new evidence. (ECF No. 55 at
13 12.) Specifically, Respondents argue that Fenton's following contention contains new
14 evidence: "The police, however, largely failed to investigate Whitewater or collect forensic
15 evidence that may have identified him a[s] the assailant." (ECF No. 63 at 3 (quoting ECF
16 No. 39 at 16).)

17 The Court acknowledges that "review under § 2254(d)(1) is limited to the record
18 that was before the state court that adjudicated the claim on the merits." *Cullen v.*
19 *Pinholster*, 563 U.S. 170, 181 (2011). However, the Court finds that Fenton is not
20 attempting to expand the record. Rather, Fenton merely contends that the police failed to
21 collect forensic evidence. This is argument, not the addition of new evidence. Accordingly,
22 the Court declines to dismiss ground 3 or strike any alleged new evidence.

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24 ²Respondents argue that *Martinez* is inapplicable here because Fenton's state
25 post-conviction counsel raised grounds 1b and 2 in state court but simply omitted them in
26 Fenton's appellate briefing before the Nevada appellate courts. (ECF No. 63 at 3 (citing
27 ECF No. 50-2).) However, because the state court granted Fenton's state habeas petition
28 on a different ground, the State appealed the granting of relief on that ground to the
Nevada appellate courts, and Fenton's answering briefing before the Nevada appellate
courts only concerned the ground upon which relief was granted, this argument is tenuous
and is best addressed during merits review.

1 **III. CONCLUSION**

2 It is therefore ordered that Respondents' motion to dismiss (ECF No. 55) is denied.

3 It is further ordered that grounds 1b and 2 are technically exhausted and
4 procedurally defaulted and consideration of whether Fenton can demonstrate cause and
5 prejudice under *Martinez* to overcome the procedural defaults are these grounds is
6 deferred until after the filing of an answer and reply in this matter.

7 It is further ordered that Respondents have until March 7, 2025, to file an answer
8 to the Second Amended Petition. The remainder of the Scheduling Order (ECF No. 27)
9 remains in effect.

10 DATED THIS 3rd Day of January 2025.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

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12 MIRANDA M. DU
13 UNITED STATES DISTRICT JUDGE
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